

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:09-cr-00022-MMD-GWF

v.

AMENDED ORDER

JOSEPH PROKOP, ALAN L. RODRIGUES
and WESTON J. COOLIDGE,

Defendants.

I. INTRODUCTION

After a trial of approximately six (6) weeks in length on 20 counts, the jury returned a verdict of guilty on all counts against Defendants Weston J. Coolidge (“Coolidge”) and Alan L. Rodrigues (“Rodrigues”), and all but two counts (counts 8 and 14) against Defendant Joseph Prokop (“Prokop”). (Dkt. no. 450.) Defendants have filed the following post-trial motions: (1) Coolidge’s Motion for New Trial (dkt. no. 464), which Rodrigues and Prokop joined (dkt. nos. 465, 468); (2) Rodrigues’ Motion for New Trial (dkt. no. 466), which Prokop joined (dkt. no. 469); (3) Rodrigues’ Motion for Acquittal (dkt. no. 470), which Prokop joined (dkt. no. 471); and Prokop’s Motion for Judgment of Acquittal and/or New Trial (dkt. no. 467). The Court grants the motions to join. (Dkt. nos. 465, 468, 469, 471.) The Court will address these motions in turn below.

II. RELEVANT BACKGROUND

The relevant facts supporting the Indictment are as follows. Dan Porter and Oryan Management and Financial Services (“Oryan”) created a shopping website called “Tax

1 Break 2000" ("the Product").¹ They sold the Product directly and through other vendors.
 2 The Indictment focuses on the distribution and sale of the Product through one such
 3 vendor, National Audit Defense Network ("NADN"). NADN ultimately became the
 4 exclusive seller of the Product for Oryan. NADN provided clients with tax-related
 5 services, including preparation of income tax returns. Rodrigues was NADN's general
 6 manager, Coolidge was NADN's chairman and president, and Prokop was Oryan's
 7 national marketing director. Prokop was the liaison between Oryan and NADN, and he
 8 trained NADN's staff to sell the Product. Defendants claimed the Product would allow
 9 customers to claim legitimate income tax credits and deductions under the Americans
 10 with Disabilities Act ("ADA") and the Internal Revenue Code ("IRC").

11 The Indictment alleges that Defendants: (1) created the Product as not accessible
 12 to disabled persons so that Defendants could sell modifications to each customer; (2)
 13 told customers that purchasing the modifications entitled them to lawful income tax credit
 14 and deductions; (3) chose a sale price for the modifications that maximizes the income
 15 tax credit and deductions; (4) induced customers to sign promissory notes ("the Note" or
 16 "the Notes") for 80% of the purchase price of the modifications with no expectation that
 17 customers would pay the Notes; (5) created false IRS Forms 1099 to give the
 18 appearance that the Products sold were generating commission income to pay off the
 19 Notes; (6) prepared tax returns on customers' behalf that claimed tax credits and
 20 business expense deductions related to the Product for which Defendants knew the
 21 customers were not eligible; and (7) mailed said tax returns to customers. (Dkt. no. 1 at
 22 ¶¶ 14–20, 41, 45.)

23 **III. LEGAL STANDARD**

24 **A. New Trial Under Fed. R. Crim. P. 33**

25 Pursuant to Federal Rule of Criminal Procedure 33(a), "[u]pon the defendant's
 26 motion, the court may vacate any judgment and grant a new trial if the interest of justice

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 28 ¹The Product had various names, including "ShopN2000" and "Mallforall."

1 so requires." Although determining whether to grant a motion for a new trial is left to the
 2 district court's discretion, "it should be granted only in exceptional cases in which the
 3 evidence preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d
 4 538, 545 (9th Cir. 1981) (citation and internal quotation marks omitted). Moreover, the
 5 defendant bears the burden of persuasion. *United States v. Endicott*, 869 F.2d 452, 454
 6 (9th Cir. 1989). Such an extraordinary remedy is appropriate, for example, when a court
 7 makes an erroneous ruling during the trial and that, but for that erroneous ruling, the
 8 outcome of the trial would have been more favorable to the defendant. See *United*
 9 *States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978).

10 **B. Acquittal Under Fed. R. Crim. P. 29**

11 The test for denial of a judgment of acquittal pursuant to Federal Rule of Criminal
 12 Procedure 29 is the same as the test for reviewing a claim that the evidence is
 13 insufficient to support a conviction. See, e.g., *United States v. Tucker*, 641 F.3d 1110,
 14 1118-19 (9th Cir. 2011); *United States v. Abner*, 35 F.3d 251, 253 (6th Cir. 1994). A
 15 criminal defendant's challenge to the constitutional sufficiency of evidence to support a
 16 criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).
 17 *Jackson* requires a court, upon such a motion, to construe the evidence "in the light most
 18 favorable to the prosecution" to determine whether "any rational trier of fact could have
 19 found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in
 20 original).

21 **IV. COOLIDGE'S MOTION FOR NEW TRIAL (Dkt. No. 464)**

22 Coolidge's Motion is based on the contention that: (1) the Court erroneously
 23 permitted the Government's expert witness, Evelyn Kay Fall, to testify as to Defendants'
 24 intent; (2) Fall improperly assessed the credibility of witnesses; and (3) the Court
 25 erroneously admitted evidence relating to Coolidge's association with Oryan
 26 Management, Inc. ("OMI"). The Court will address each argument below.

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1 **A. Claim Regarding Fall's Testimony Of Defendants' Intent**

2 The scope of Fall's testimony was the subject of a pre-trial motion. The Court
 3 determined that Fall would be allowed to testify to the Internal Revenue Code, her
 4 opinion of which claimed deductions were not allowed given her understanding of the
 5 IRC. (Dkt. no. 374.) In making this ruling, the Court rejected Defendants' argument that
 6 Fall should not be permitted to testify as to which claimed deductions were not allowed.
 7 In *United States v. Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1942), which involved the
 8 deductibility of interest where the Government contended that the claimed interest
 9 payment was a sham, the court found that while "the opinion on the deductibility of the
 10 interest was intimately related to the question of [Defendant]'s guilt or innocence, it was
 11 still admissible." The court reasoned that under Federal Rule of Evidence 704 "testimony
 12 in the form of an opinion or inference otherwise admissible is not objectionable because
 13 it embraces an ultimate issue to be decided by the trier of fact." See *id.* (internal citation
 14 omitted). Additionally, the court concluded that any potential prejudice was dispelled by
 15 the court's instruction to the jury regarding the weight given to expert testimony. See *id.*
 16 In light of *Clardy*, this Court concluded that, the jury would be instructed on the weight
 17 given to expert testimony and Defendants would have the opportunity to cross-examine
 18 Fall.² However, the Court agreed with Defendants that Fall should not be permitted to
 19 testify as to Defendants' state of mind, including Defendants' intent in counseling
 20 taxpayers.

21 Coolidge contends that Fall did indeed testify as to Defendants' collective intent.
 22 However, the cited testimony does not support Coolidge's argument. In the first cited
 23 testimony, Fall testified as to the amount of disabled access credit claimed — \$5,000
 24 taken off the tax filer's tax liability — and claimed expense deductions — \$821 assuming
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 26

27 ²At trial, the jury was so instructed. And Defendants' counsel did put Fall through
 28 rigorous cross-examination. For example, counsel for Coolidge questioned Fall about
 assumptions she made in calculating the potential tax loss to the IRS. (Dkt. no. 458 at
 14-15.)

1 a 15% tax rate — on a given tax filing, resulting in certain tax benefit to the taxpayer and
 2 loss to the IRS — \$5,821. (Dkt. no. 464 at 5; dkt. no. 457 at 86.) Fall then extrapolated
 3 this information to quantify the potential tax loss to the IRS based on the number of
 4 Products sold by NADN during the period of the Indictment.³ (Dkt. no. 457 at 85; Exh.
 5 338.) Fall offered a straightforward calculation based on admitted evidence and certain
 6 assumptions. On cross-examination by Coolidge's counsel, Fall explained that one
 7 assumption she made was that for each Product sold, the tax filer would have claimed
 8 the full \$5,000 disabled access credit. (Dkt. no. 458 at 14.) Fall further admitted on
 9 cross-examination that her testimony related to potential tax loss to the IRS, but she did
 10 not know the actual tax loss. (*Id.* at 15.) Fall's testimony did not touch upon or even
 11 implicate Defendants' state of mind relating to the Product or marketing of the Product or
 12 their good faith belief that the Product was legal.

13 Coolidge further argues that Fall's testimony regarding Defendant's intent was
 14 compounded by the Court's admission of a piece of summary evidence — entitled
 15 "Summary of Total Potential Tax Loss" (Government Exh. 338) — as demonstrative
 16 evidence. (Dkt. no. 457 at 84.) However, as the Court found when admitting Exh. 338,
 17 the summary merely offers a mathematical calculation of the total potential tax loss
 18 based on the number of Products sold by NADN and the amount of claimed disabled
 19 access credit and claimed business expenses. Fall explained the calculation during her
 20 testimony. (*Id.* at 84-89.) Exh. 338 does not suggest nor would a reasonable jury infer
 21 that the summary calculation evidences Defendants' state of mind.

22 B. **Claim Regarding Fall's Assessment of Witness Credibility**

23 Coolidge argues that Fall improperly intruded into the province of the jury by
 24 assessing the credibility of other witnesses. The Court finds that the cited testimony does
 25 not support Coolidge's argument.

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 27 ³Fall testified that NADN sold 18,052 products, resulting in a potential tax loss of
 28 \$105,080,692 (18,052 x \$5,821). (Dkt no. 457 at 84; Exh. 338.)

1 Coolidge argues that, on cross-examination by Rodrigues' counsel, Fall implicitly
2 suggested that certain witnesses were not credible by testifying that she did not consider
3 their testimony in reaching her opinion. For example, Coolidge relies on the following
4 cross-examination of Fall by Rodrigues' counsel:

5 Q: So you've already concluded that no matter what these people say
6 about what they intended to do, or even what they did with respect to
7 marketing this, that it wasn't enough, in your opinion, for any of these
taxpayers to qualify for legitimate business deductions with respect to this
Product business?

8 A: That's what the facts are brought out in the evidence during this trial.

9 (Dkt. no. 458 at 31:5-12.) Coolidge relies on the above exchange to argue that Fall
10 improperly assessed witness credibility. The Court disagrees with Coolidge's
11 observation. Fall's testimony went to what she remembered to be testimonies of other
12 witnesses and evidence offered in the case, not her opinion as to any of the witnesses'
13 credibility or even her assessment of these witnesses' testimonies. How much weight, if
14 any, the jury gave Fall's testimony depended on what they recalled to be the evidence
15 admitted and whether their recollection differed from hers. Moreover, Coolidge
16 disregards the next exchange between Rodrigues' counsel and Fall:

17 Q: And if the facts are interpreted different, if people remember different
18 things about what these individuals said they did or didn't do, you could be
wrong with respect to some of these taxpayers, correct?

19 A: I suppose.

20 (*Id.* at 31:13-17.) Fall thus admitted that her recollection about other witnesses'
21 testimonies could be wrong.

22 Coolidge also relies on Fall's testimony that she disagreed with the testimony of
23 another Government witness, Jeff Schnepper. (Dkt. no. 464 at 10.) The Government
24 offered Schnepper, an accountant and attorney with an LLM in tax and years of
experience as Microsoft's tax expert online, to testify about the opinion he gave to Dan
25 Porter and Oryan about the legality of the Product. On cross-examination of Fall,
26 Rodrigues' counsel elicited Fall's admission that she disagreed with Schnepper's
27 "opinion" that how a product was marketed doesn't have much impact on the legitimacy
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1 of the business if the business was legitimate. (Dkt. no. 458 at 33.) Because both Fall
 2 and Schnepper's testimonies involved their expert opinions, that Fall disagreed with
 3 Schnepper's opinion may have in fact undermined the Government's case if the jury
 4 found Schnepper to be more credible. In any case, Fall's testimony does not support the
 5 claim that Fall invaded the province of the jury by assessing Schnepper's credibility.

6 **C. Claim Regarding Coolidge's Association with OMI**

7 In its pretrial ruling, the Court permitted the Government to offer evidence that
 8 Coolidge assisted Dan Porter to create Oryan Management, Inc. ("OMI"). The Court
 9 based its decision on the Government's representation that OMI was to take the place of
 10 Oryan, which created, marketed, and serviced the Product. The Court agreed with the
 11 Government that Coolidge's conduct was inextricably intertwined with the allegations in
 12 the Indictment that OMI operated as a shell company of Oryan and admitted this
 13 evidence under Rule 404(b), finding that the information would lay the necessary
 14 foundation regarding Coolidge's alleged intentional participation in the conspiracy at
 15 issue in this case.⁴ Coolidge now argues that the Government's use of evidence relating
 16 to OMI exceeded the scope of the Court's ruling and confused the issue for the jury. The
 17 Court disagrees.

18 The evidence offered at trial further bolsters the Court's finding that Coolidge's
 19 involvement in the creation of OMI was inextricably intertwined with the allegations in the
 20 Indictment. The evidence offered shows that Coolidge's involvement in the creation and
 21 management of OMI permitted Oryan to continue to market and sell the Product through
 22 NADN. Porter testified that Rodrigues had referred him to Coolidge when Porter
 23 expressed his concerns about the promissory notes and its tax implications. (Dkt. no.
 24 496 at 107.) Government Exh. 316 shows that in December 2001, Coolidge met with
 25 Dan Porter to discuss the creation of a shell company, ultimately named OMI,⁵ to

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 27 ⁴The Court permitted Coolidge to assert a standing objection to all evidence
 admitted during trial relating to his involvement in the creation of OMI.

28 ⁵OMI's previous name was Computer Systems. Exh. 294.

1 essentially allow Porter to continue to sell the Product. (Exh. 316; dkt. no. 496 at 108-
 2 09.) Coolidge thus became involved in the selling of the Product through OMI months
 3 before he became president of NADN in May 2002. With Coolidge's assistance, OMI
 4 subsequently acquired the stock of NADN from its prior owners to permit NADN to
 5 continue to operate, market and sell the Product.⁶ (Exh. 250-252; dkt. no 496 at 176-
 6 182.) By that time, according to Porter, he wanted NADN to stay in business because
 7 one hundred percent of the sale of the Product was made by NADN. (Dkt. no. 496 at
 8 166.) The admitted evidence relating to OMI shows that the creation of OMI furthered the
 9 alleged conspiracy in that Oryan and NADN were able to continue to market and sell the
 10 Product. Coolidge's entanglement in Oryan, NADN and OMI was part of his significant
 11 participation in furthering the alleged conspiracy and could not have been separated
 12 from the alleged conspiracy.

13 **V. RODRIGUES' MOTION FOR ACQUITTAL (Dkt. No. 470)**

14 Rodrigues argues that the evidence is insufficient to sustain the jury verdict
 15 because the Government failed to prove: (1) the unlawfulness of the Product; (2)
 16 Rodrigues' involvement in the alleged conspiracy; and (3) Rodrigues' intent.

17 **A. Claim Regarding Unlawfulness of the Product**

18 Rodrigues argues that the evidence is insufficient to sustain the jury's verdict
 19 because the Government failed to offer any testimony by a qualified expert witness that
 20 the Product was definitively illegal, that the Product was not a viable vehicle for operating
 21 a business, that the promissory note was a sham or that the disabled access credit did
 22 not apply to businesses created after 1991. However, construing the evidence in the
 23 light most favorable to the Government, the Court finds that the evidence sustains the
 24 jury's verdict.

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 26 ⁶In fact, Cort Christie's testimony and Exh. 249 show that while Porter loaned
 27 \$100,000 in cash to NADN, the promissory note to secure the loan was made to OMI.
 28 The stock purchase agreement involving the sale of NADN to OMI is dated March 12,
 2002. Exh. 252.

1 The evidence is sufficient to support the jury's finding that the Product as
2 marketed and sold was unlawful. Testimonies from Fall, Robert Stoval and Joe Tigani
3 support the finding that the Product was unlawful. While there were testimonies about
4 provisions of IRC 44, including whether the home based business created with the
5 Product was an eligible business and whether the ADA applies to the Internet, these
6 issues are not pertinent to the legality of the Product as presented in this case. This is
7 because the Government offered evidence that the Product, as marketed and sold, was
8 a tax product offered and priced to maximize tax benefits, and the Note was a sham.
9 The evidence offered at trial, particularly through testimony of Dan Porter, shows that the
10 Product was created to pass IRS scrutiny with the inclusion of the Note and, toward the
11 latter part of the scheme, the issuance of 1099 forms. Porter and Joe Orgell testified that
12 the Product was priced to create a cash positive for customers. Porter testified that no
13 money exchanged hands when customers clicked through banner ads to pay down the
14 Note. Porter also testified that Oryan, the holder of the Notes until September 2002, did
15 not receive payment from the "click throughs" to pay down the Notes. Several customers
16 testified that they were told they did not have to pay down the Note. Rocky Gannon
17 testified Rodrigues told him he would not have to pay down the Note and that the
18 Product would be a tax savings. Gary Allgood, an NADN sales representative, testified
19 that he purchased the Product, understood he did not have to pay the Note, and told
20 customers he didn't have to pay the Note. Allgood understood that \$2 per click would
21 reduce the amount of the Note but he did not do the "click throughs" and no one pursued
22 payment under the Note. While some customers, such as Harold Routzang, John Aloe
23 and Kathy Bumpas, testified that they purchased the Product because they wanted to
24 start a home-based business, they also testified that they were told the tax savings
25 would be greater than the purchase price and they need not worry about the Note.⁷

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27 ⁷For example, Harold Routzang testified he was interested in starting a business
28 and did try to promote the Product. He was also told the Note would be paid off at \$2 per
click.

1 Alfonso Lindsey and Rocky Gannon testified they did not do any work to promote their
 2 website Product as a home based business. Daniel Ellison testified he bought the
 3 Product to obtain the \$5,000 tax credit to reduce his tax liability. Ann Cirillo, a special
 4 education teacher, testified she purchased the Product for a couple of consecutive years
 5 for the purposes of lowering her taxes because NADN sales staff told her it was a way to
 6 help reduce her tax liability; she was not told that the Product was a home based
 7 business opportunity nor was she looking for a business opportunity. The Government's
 8 main expert witness, Evelyn Kay Fall, explained why the disabled access credit and
 9 deductions would be disallowed even assuming the ADA applies to the Internet. While
 10 she testified under cross-examination by Rodrigues' counsel that she based her opinion
 11 on what she remembered to be the evidence in the case, and Rodrigues' counsel tried to
 12 demonstrate that Fall ignored testimonies of some of the customers as to their intent with
 13 respect to the Product, her testimony overall is sufficient to support the jury's verdict that
 14 the Product as marketed and sold was not legal.

15 B. Claim Regarding Rodrigues' Involvement in Alleged Conspiracy

16 Rodrigues next argues that the Government failed to show he was an important
 17 participant in the conspiracy or joined the conspiracy at any particular point in time
 18 because he did not make the decision to sell the Product or engage outside counsel to
 19 provide their legal opinion about the legality of the Product. Again, the Court disagrees.

20 The Government introduced evidence through Dan Porter's testimony that
 21 detailed extensive dealings with Rodrigues as well as Coolidge regarding the continued
 22 sale of the Product despite IRS scrutiny. Porter testified that he called Rodrigues and
 23 Coolidge separately and told them about the IRS Criminal Division's search of Oryan's
 24 offices.⁸ Porter told them he was done and did not want to sell the Product any longer
 25 because the IRS's raid solidified his belief that the Product was wrong. (Dkt. no. 497 at
 26 22-23; 26-27.) Porter testified he gave Rodrigues and Coolidge a copy of the search

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 28 ⁸The IRS executed a search warrant on Oryan's offices in July 2002.

warrant and the supporting affidavit when they met in Las Vegas, and the affidavit explained the IRS' position with respect to the legality of the Product. (*Id.* at 30-38). They discussed how to continue to sell the Product and, in response to Porter's claim that he no longer wanted to sell the Product, Coolidge said he would find someone to take over for Porter. (*Id.*) Porter also testified that he had discussion with Rodrigues and Coolidge where they told him they wanted to sell the Product for about "six months, eight months, two years," to make enough money so there would not be a need to sell the Product anymore.⁹ (*Id.* at 44-45.) Porter also testified that he met with Rodrigues and Coolidge at the Rio Hotel in Las Vegas to discuss the "click throughs" and the fact that there was no money paid to anyone as a result. (*Id.* at 90-93.) Porter testified that in early 2003, he, Coolidge and Rodrigues had a meeting with a CPA where they discussed the need to have 1099 forms issued for the "click throughs." (*Id.*) Coolidge's handwritten notes support Porter's testimony relating to some of these discussions. (See e.g., Exh. 282.) Two former NADN employees, Panos Pappagianapolous and Marie Orie, testified they had discussions with Rodrigues relating to the legality of the Product. In addition, the Government's Exh. 265 shows that at the 341 meeting of creditors in connection with NADN's bankruptcy, Coolidge referred Rodrigues to respond to questions about the Product. The jury may infer from this evidence that Rodrigues was more familiar and involved with the sale of the Product.

Rodrigues correctly pointed out in his motion that he did not hire the outside attorneys, Michael Potter or Curtis Shaw, to prepare their opinion letter. However, Potter testified that Rodrigues asked him to change his opinion letter to modify the chance that the Product would pass legal scrutiny; and Porter testified he hired Shaw at Rodrigues

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⁹Under cross examination, Porter changed the length of time that Rodrigues and Coolidge told him they would need to sell the Product. Porter also testified that he met with Rodrigues, Coolidge and Robert Goetsch in December 2003 to discuss the risks and rewards of continuing to sell the Product because he was concerned about being paid by NADN and the consensus was to continue to sell until ordered to stop.

1 and Coolidge's direction and they asked him to ask Shaw to falsely date the opinion
 2 letter for December 2002.

3 The evidence is sufficient for the jury to find that Rodrigues was intimately
 4 involved in the alleged conspiracy.

5 **C. Claim Regarding Rodrigues' Intent**

6 Finally, Rodrigues argues that the Government failed to offer evidence to show
 7 when he formed the requisite intent or knowledge that he violated tax laws. To the
 8 contrary, the Court finds that the evidence, viewed in the light most favorable to the
 9 Government, is sufficient for the jury to find that Rodrigues knew the Product was not
 10 legal. The jury could infer from the testimony of Rocky Gannon that Rodrigues knew the
 11 Note was a sham. Gannon testified that Rodrigues told him he would not have to pay
 12 down the Note and the Product would be a tax savings. The jury could also infer from the
 13 evidence discussed above that Rodrigues knew the Product was not legal, but that he
 14 directed the continued sale of the Product until ordered to stop by the IRS.¹⁰

15 **VI. RODRIGUES' MOTION FOR NEW TRIAL (Dkt. No. 466)**

16 Rodrigues asserts three grounds to support his request for a new trial: (1) the jury
 17 verdict is against the weight of the evidence; (2) the cumulative impact of the Court's
 18 erroneous rulings on two categories of evidence deprived him of a fair trial; and (3)
 19 Porter's testimony was not reliable and cannot serve as a basis for findings of guilt. The
 20 Court agrees with the Government that this is not one of those "exceptional cases in
 21 which the evidence preponderates heavily against the verdict" to compel a new trial.

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¹⁰ Defendants raised the same argument in their oral Rule 29 motion made at the close of the Government's case. Defendants argued: (1) that the evidence is insufficient to show a conspiracy existed in that they did not enter into an agreement with Porter to defraud the IRS; (2) even if the Court were to consider Porter's testimony that he had fraudulent intent, Porter did not communicate his intent to Defendants; and (3) Defendants did not agree to sell the Product with the intent to defraud the IRS. In rejecting Defendants' arguments, the Court cited evidence supporting Defendants' involvement and their individual intent.

1 *Pimentel*, 654 F.2d at 545. The Court will address the first and third arguments in
 2 tandem.

3 **A. Claim Regarding Weight of the Evidence and Porter's Testimony**

4 The gist of Rodrigues' argument is that the evidence does not support the jury's
 5 finding of criminal intent, particularly if the Court discounts Dan Porter's testimony. With
 6 respect to Dan Porter, the Court does not agree with Rodrigues' argument that Porter's
 7 testimony should be discounted entirely as unreliable.¹¹ The Government correctly points
 8 out examples of where Porter's testimony is supported by other evidence. As discussed
 9 above, Coolidge's notes also corroborate Porter's testimony. Considering Porter's
 10 testimony as summarized herein, the evidence shows that Defendants, including
 11 Rodrigues, knew that the Product as marketed and sold was unlawful. In fact, Porter
 12 testified that they (Porter, Rodrigues, Coolidge and Goetsch) discussed the risks
 13 involved and agreed to continue to sell the Product until ordered to stop. However, even
 14 if the Court were to discount Porter's damaging testimony, the Court does not find that
 15 the evidence preponderates heavily against the jury's verdict. While proof of each
 16 individual defendant's intent was probably the most challenging aspect of the trial for the
 17 Government, the Government offered circumstantial evidence that is sufficient for the
 18 jury to find criminal intent.

19 Defendants assert that they acted in good faith and lacked criminal intent. The
 20 Court will address some examples of evidence offered, aside from Porter's testimony,
 21 during the long course of trial that supports finding that Defendants had the required
 22 knowledge and criminal intent. Stovall and Tigani testified that Rodrigues had reviewed
 23 the Stovall Memo dated April 11, 2001.¹² (Exh. 204.) The Stovall Memo discussed
 24 various aspects of the Product and raised several concerns about the legality of the

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 27 ¹¹Nor does the Court agree that the evidence supports Defendants' theory that
 28 Porter was the mastermind behind the scheme and deceived them all.

12Coolidge became aware of the Stovall Memo in February 2002. (Exh. 282 at 4.)

Product. In particular, the Stovall Memo warned that if the IRS determined there “is no economic substance to the activity, and that indeed, it was organized and sold solely for its purported tax advantage(s),” then individuals involved may be subject to criminal and civil penalties. (*Id.*) While Stovall and Tigani ultimately recommended getting a second and then a third opinion, the evidence supports the finding that the attorneys selected to provide additional legal opinions lacked the requisite expertise to render these opinions. Rodrigues received recommendations from Tigani and Stovall of law firms in Washington D.C. with expertise in tax law to hire to obtain a legal opinion. (Dkt. no. 491 at 37-38.) This occurred twice and on both occasions, their recommendations were rejected.¹³ (*Id.* at 47, 49-50, 98.) With respect to Michael Potter’s opinion letter, he testified he was asked to address the applicability of the ADA to the Internet and was told that other aspects of the Product would be addressed by NADN’s employees. In fact, Potter testified that he told Rodrigues that NADN should obtain other opinion letters before selling the Product. (Dkt. no. 506 at 49-50, 88.) Potter testified that Rodrigues asked Potter to change the odds in his opinion letter because the original draft, putting the odds at a one-in-three chances of success, would not be helpful.¹⁴ (*Id.* at 32-35, 81-82, 123-24.) Potter’s final letter changed the odds to “one-in-three and more likely closer to one-in-two in terms of success” as Rodrigues requested. (Exh. 116.) Other evidence offered

¹³Cort Christie testified that he made the decision to retain Michael Potter. While Rodrigues was not involved in rejecting their recommendation the first time, he knew that the attorney hired to provide the second opinion was not one of those with expertise in tax laws recommended by Stovall and Tigani. In connection with the solicitation of a third opinion letter, Stovall and Tigani prepared a draft letter to outline the issues they proposed should be addressed, and Stovall discussed the letter with both Coolidge and Rodrigues. (Dkt. no. 491 at 50-50.) The jury may infer that either Coolidge or Rodrigues rejected their recommendation since Shaw was hired instead. Even if Rodrigues did not make the decision, he again knew that qualified counsel recommended by their own internal experts were not retained. Rodrigues' involvement and knowledge that qualified counsel was not selected may have caused the jury to question his claim that he in good faith relied on Potter and Shaw's opinions.

¹⁴Potter further testified that he felt somewhat pressured by Rodrigues to change his letter and he had some concerns that he would not be paid for the balance of his fees. (Dkt. no. 506 at 36-37.)

1 shows that Rodrigues was on notice that he should not rely on Potter's letter. For
 2 example, Les Shapiro, an attorney who was a consultant for NADN and a member of its
 3 Tax Advisory Board, wrote a letter to Rodrigues dated May 15, 2002, that Potter's letter
 4 "doesn't get into the substance of the NADN program." (Dkt. no. 491 at 88; Exh. 225.)
 5 With Curtis Shaw, a simple comparison of his letter with Potter's letter shows that Shaw
 6 plagiarized Potter's letter. Stovall testified he pointed this out to Rodrigues.¹⁵ (Dkt. no.
 7 491 at 65.) The cited evidence supports the conclusion that Rodrigues was on notice of
 8 the legal issues with the Product, but chose to ignore the warnings and instead
 9 continued to look for ways to continue to sell the Product. For example, the Stovall
 10 Memo warned that if the IRS determined the Product was organized solely for its tax
 11 benefits, they may pursue criminal and civil penalties. Yet, the Government offered
 12 ample evidence for the jury to find that with Defendants' knowledge, NADN marketed
 13 and sold the Product as a tax product yielding tax benefits. Why else would NADN
 14 market and sell the Product to some of the customers or their spouse for multiple
 15 years?¹⁶

16 B. **Evidentiary Rulings**

17 Rodrigues argues that Defendants were prejudiced by the Court's erroneous
 18 admission of evidence relating to Coolidge's involvement with the creation of other
 19 entities, including OMI, and exclusion of evidence relating to the unclear nature of the
 20 laws and the IRS' positions. As discussed above, the Court does not find that it made an
 21 error in admitting evidence relating to Coolidge's involvement in the creation of OMI. The
 22 Court agrees with the Government that Rodrigues has not demonstrated how he is
 23 prejudiced by evidence relating to Coolidge's involvement in the creation of shell
 24 companies that formed part of the alleged conspiracy. In fact, the evidence offered

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 26 ¹⁵Coolidge's notes show this issue was discussed at the Tax Advisory Board
 27 meeting on June 9, 2003 where Rodrigues was present. (Exh. 183.)

28 ¹⁶James Johnston and Ann Cirillo testified they bought the Product for multiple
 years for the purpose of tax benefits.

1 overall supports the finding that doing business through corporate entities was nothing
2 out of the ordinary. For example, Cort Christie testified about one of his entities, Nevada
3 Corporate Headquarters, providing corporate services and acting as a nominee.
4 Moreover, Coolidge's involvement with the creation of other entities was inextricably
5 intertwined with the allegations in the Indictment. As to the exclusion of evidence relating
6 to the unclear nature of the laws during the period alleged in the Indictment, the
7 Government correctly notes that the Court did permit limited inquiries about the state of
8 the law, particularly in connection the cross-examination of Stovall, Tigani, Potter,
9 Richard St. John and Fall. In any event, the Court disagrees that it was erroneous to
10 exclude evidence, which Prokop's counsel sought to admit, relating to the alleged
11 unsettled nature of certain IRC provisions that deal with claiming credits under the
12 Americans with Disabilities Act and the internal IRS discussions relating to the Product
13 and the auditing of returns claiming the tax shelter. The evidence presented at trial does
14 not change the Court's pretrial findings that any claimed uncertainty was irrelevant to the
15 Defendants' scheme as alleged in the Indictment and presented at trial. (Dkt. no. 374.)
16 As discussed above, the evidence was sufficient for the jury to find that the Product as
17 marketed and sold involved a tax scheme where customers paid about \$2495 for the
18 Product, and in return, claimed \$5000 disable tax credits (for the most part) and about
19 \$5000 as business expenses on their schedule C. Thus, it is entirely irrelevant whether
20 the ADA applies to the Internet or whether the disabled tax credit is limited to
21 modifications of existing physical businesses. Exclusion of evidence calling into question
22 the purported uncertainty of the tax law and the IRS's internal debate about how to
23 approach auditing of the tax shelter was proper under Fed. R. Civ. P. 402 and 403.

24

25 **VII. PROKOP'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR NEW TRIAL**
(Dkt. No. 467)

26 **A. Motion for judgment of Acquittal**

27 Prokop asserts the general argument that the Government failed to prove his
28 knowledge about the legality of the Product and his criminal intent. As the Court found in

1 denying his Rule 29 motion on this same ground, the evidence is sufficient to support
2 Prokop's knowledge and intent. The following is an example of some of this evidence
3 aside from the evidence cited in the Government's response. Prokop was involved in
4 preparing the marketing materials and sales scripts for the Products used by NADN.
5 Porter testified he told Prokop what information should not be disclosed to customers in
6 the marketing of the Product. Porter told Prokop to refrain from telling customers that the
7 Product was an investment because in that case customers would not be eligible for the
8 tax benefits. Porter also told Prokop to avoid telling customers that the Product was a
9 tax shelter because a whole set of rules would then apply. Drew Orgell testified that,
10 after the IRS search of Oryan's offices in July 2002, Prokop told him that Prokop was in
11 "hot waters" with Porter because he had described the Product to the IRS undercover
12 agent in a way that he shouldn't have and contrary to the way that Porter wanted him to
13 present the Product. Prokop told the agent that the most a customer would ever have to
14 pay for the Product is \$2500 because of the escape clause. (Exh. 63.) The jury may
15 have construed this as Prokop's knowledge that the Note was a sham. Moreover,
16 Prokop was aware of the IRS's search of Oryan's offices. Porter reviewed and discussed
17 with Prokop the IRS search warrant and the supporting affidavit showing the IRS'
18 position about the legality of the Product, including the criminal statutes that may apply.
19 (Dkt. no. 497 at 18, 21-22.) Yet, Prokop continued to participate in the sale and
20 marketing of the Product. Even if Porter directed Prokop's activities, the evidence is
21 sufficient to support the jury's finding that Prokop knew about the legal issues with the
22 Product, but he continued to be involved in promoting the sale of the Product.¹⁷ Viewed
23 in the light most favorable to the Prosecution, a rational trier of fact could have found the
24

25 ¹⁷For example, as the Government noted in its response, Prokop was copied on
26 emails exchanged with David Tedder in which he raised the issues with the application
27 of the disabled access credits to businesses that were not in existence before passage
28 of the ADA. (Dkt. no. 475 at 6; dkt. no. 305.) Another example is Prokop's involvement in
the drafting of the sales scripts used by NADN's sales team and training of NADN's
sales team on how to sell the Product. This evidence would further supporting the finding
that Prokop knew the Note was a sham.

1 element of criminal intent beyond a reasonable doubt to support a verdict against
2 Prokop.

3 **B. Motion for New Trial**

4 Prokop presented his motion based on two separate categories of arguments:
5 issues that arose during trial and issues that were the subject of pretrial motions. With
6 respect to the latter category, Prokop in a perfunctory manner summarizes the issues
7 raised in previous motions. The Court is not persuaded to revisit these issues, let alone
8 to find that it erred in its previous rulings. The Court relies on its previous rulings and will
9 not repeat them here. As to the former category, Prokop includes a general argument of
10 jury misconduct, part of which was raised and addressed during trial. Nonetheless, the
11 Court will address this argument again.

12 **1. Claim of Inconsistent Verdict**

13 Prokop argues that because the jury found him guilty on all but two counts (counts
14 8 and 14), the verdict is inconsistent and should be set aside. (Dkt. no. 450 at 6.) The
15 Court disagrees.

16 The Indictment includes 14 counts (counts 2 through 16) of aiding in the
17 preparation of materially false income tax returns in violation of 26 U.S.C. § 7206(2).
18 (Dkt. no. 1 at 9-10.) The Indictment alleges that Defendants “willfully aided and assisted
19 in, and procured, counseled, and advised the preparation and presentation to the
20 Internal Revenue Service” individual returns for certain years that “were false and
21 fraudulent as to material terms.” (*Id.* at 9:9-15.) These counts relate to different
22 taxpayers, and in some counts, the same taxpayers for different tax years. For example,
23 count 8 involved the 2003 tax returns of Richard and Judith Howard and the allegation
24 that they claimed business expenses associated with the Product. (*Id.* at 10.) Count 14
25 involved the 2003 tax returns of Anthony and Christine Prato, who allegedly claimed a
26 portion of the disabled access credit as well as business expenses associated with the
27 Product. (*Id.*) These taxpayers were not identified in any of the other remaining 12
28 counts involving § 7206(2).

1 As the Supreme Court reiterated in *United States v. Powell*, 469 U.S. 57, 58
 2 (1984), “a criminal defendant convicted by a jury on one count could not attack that
 3 conviction because it was inconsistent with the jury’s verdict of acquittal on another
 4 count.” *Id.* (citing *Dunn v. United States*, 284 U.S. 390 (1932)). In *Powell*, the
 5 government did not dispute the contention that the jury’s verdict — they acquitted
 6 defendant of conspiracy to possess cocaine and possession of cocaine, but found her
 7 guilty of using the telephone to facilitate those offenses — was inconsistent. *Id.* at 479.
 8 However, the Court declined to create an exception to the established rule in *Dunn*, even
 9 though the jury’s verdicts “cannot be rationally reconciled.” *Id.*

10 Here, unlike in *Powell*, the jury’s decision to acquit Prokop on two counts but to
 11 convict on the other 12 counts under § 7206(2), involving different taxpayers, does not
 12 show any inconsistency. This is because the jury’s conviction of Prokop on the other 12
 13 counts (counts 2-7, 9-13 and 15-16) did not require them to convict him on counts 8 and
 14 14.¹⁸ Counts 8 and 12 did not involve the same taxpayers as the other 12 counts of §
 15 7206(2) violations. However, even accepting Prokop’s argument that the jury’s verdict is
 16 inconsistent, such inconsistency cannot be attacked under the *Dunn* rule. *Powell*, 469
 17 U.S. at 58.

18 **2. Claim of Jury Misconduct**

19 Prokop cites to a number of incidents involving several jurors, but he fails to
 20 explain how these incidents show any misconduct. The Court will address each of
 21 Prokop’s cited incidents below.

22

23 ¹⁸As the Court recalls, the evidence in general shows that the taxpayers identified
 24 in counts 2 through 16 purchased the Product from NADN but received documents
 25 about the Product from Oryan. The Court does not recall whether there was evidence of
 26 any communications or documents from Oryan to the taxpayers identified counts 8 and
 27 14. The absence of such evidence may be a reason why the jury decided not to convict
 28 Prokop on these two counts, but such a determination by the Court would be mere
 speculation. As the *Powell* Court noted as another reason for not allowing defendants to
 challenge inconsistent verdicts, “an individualized assessment of the reason for the
 inconsistency would be based either on pure speculation, or would require inquiries into
 the jury’s deliberations that courts generally will not undertake.” *Powell*, 469 U.S. at 66.

1 The Court previously addressed Prokop's claim with respect to Juror 12.¹⁹

¹⁹There is a discrepancy in how the parties referred to the jurors. This was in part due to the Court's failure to clarify the juror numbering on the record after the Court excused Juror 6 during the first week of trial. Alternate Juror 1 became Juror 12.

²⁰This exchange with counsel occurred on May 15, 2014. (Dkt. no. 504 at 78-82.)

an open mind. No hand was raised. They also confirmed that they have not reached a decision about the case.

Outside the presence of the jury, Prokop's counsel moved to dismiss Juror 12, citing his client's discomfort with Juror 12 because of her body language (i.e., she did not make eye contact on significant questions). The Court denied his motion, finding that there was no basis to remove Juror 12. In terms of Juror 12's demeanor, she did appear to be somewhat uncomfortable with the separate proceedings. Juror 12 was placed in an intimidating environment where she had to answer questions posed by the presiding judge in front of five attorneys and three defendants. Participants sat at a round table and Juror 12 appeared to try to make eye contact with the undersigned and those around the table. In such a setting, it would have been surprising had Juror 12 not revealed any physical signs of nervousness. More importantly, Juror 12's response and the Court's polling of the other jurors show that the jurors did not have any discussion about the case, were not improperly influenced by anything that may have occurred, had not reached an opinion and continued to keep an open mind about the evidence. Under these circumstances, the Court found that no misconduct had occurred.²¹ As the Ninth Circuit has opined, “[w]hat is crucial is ‘not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury.’” *Davis v. Woodford*, 384 F.3d 628, 653 (9th Cir. 2004) (quoting *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974)). Prokop's cursory argument in this current motion does not persuade the Court to reconsider its finding that Juror 12's conduct did not rise to the level of misconduct that would compel her dismissal, let alone a new trial.

Prokop contends that the Court excused Juror 7 without obtaining an explanation from her when she provided a note at the end of the second day of deliberations.²² The

²¹Indeed, Prokop's counsel acknowledged that no misconduct had occurred, but sought to remove Juror 12 because of his client's discomfort with her demeanor.

²²Prokop incorrectly referred to this juror as Juror 8. Again, this juror was initially seated as no. 8, but became Juror 7 after the Court excused Juror 6 during the first week of trial.

records do not support this contention. On the afternoon of May 23, 2014, the second day of jury deliberations, the Court received a note from Juror 7, stating that she "does not have the luxury of returning on Tuesday to resolve this and may an alternate be brought in to resolve the case?" The Court notified counsel by phone and asked counsel to return to the courtroom for the Court to make further inquiry of Juror 7. In the meantime, the Court received a note from another juror stating that she was feeling pressured by a fellow juror to come to a decision that day. The Court informed counsel of this note and determined that the issue would be resolved given that the Court planned to direct the jurors to recess for the three day weekend and resume deliberations on Tuesday, May 27, 2014. The Court proposed bringing the jury into court to give them their recess instruction and send them home and having the courtroom administrator ask Juror 7 to return to the courtroom for the Court to make further individual inquiry about her note. All counsel, including Prokop's counsel, agreed with this approach.²³ In the presence of counsel, Juror 7 stated that she thought the trial would take five to six weeks based on the summons and she had patients — ten patients a day — who were scheduled for tests on Tuesday, May 27, 2014, and had been told to fast for their tests. These patients had to complete these tests for surgery on Wednesday and Thursday, and Juror 7 had no one to cover for her. Counsel for Coolidge then moved to excuse Juror 7 and counsel for the other parties, including Prokop, explicitly stated they did not have any objection. Prokop cannot complain about the Court's handling of Juror 7's excuse when he did not object to her dismissal. To be clear, even if Coolidge's counsel did not move to excuse Juror 7, the Court would have excused her for good cause.

Prokop also offers as another example of juror misconduct the response from Alternate Juror 1 when she was called in as a replacement. This juror asked if she was

²³Prokop refers to the incident with the note from the juror who indicated she felt pressure to reach a decision that Friday afternoon. However, he agreed with the Court's decision not to make further inquiry. To the extent this juror felt pressure, the problem was obviated by the Court directing the jury to recess and resume deliberations after the three day weekend.

1 being “punked” when she was notified about the need to join the jury’s deliberations. It is
 2 not clear to the Court why such a reaction would show juror misconduct or any
 3 impropriety. In any event, before the jury began their deliberations on Tuesday, May 27,
 4 2014, the Court instructed them to disregard their previous deliberations and start over.²⁴

5 The examples of issues that occurred with respect to the jurors over the course of
 6 the six week trial, whether considered individuality or in totality, do not support Prokop’s
 7 claim of juror misconduct to warrant a new trial.

8 **3. Claim of Pre-accusatory Delay**

9 While Prokop titled this section of his motion as “pre-accusatory delay,” his
 10 argument seems to be focused on the delay post-indictment.²⁵ Prokop argues that “the
 11 drastic delay and lack of a speedy trial” prejudiced him. This contention is surprising
 12 given the parties’ representation about the complexity of this case and their collective
 13 requests for continuances before this case was reassigned to the undersigned in May
 14 2012. In fact, at the July 5, 2012 status conference, Coolidge’s counsel represented that
 15 Defendants estimated it would take 6-8 months to obtain discovery and another 12
 16 months to process the information. (Dkt. no. 151.) The Government’s counsel gave an
 17 estimate of 2 and 1/2 to 3 and 1/2 months to complete discovery. (*Id.*) The Court set trial
 18 for July 2013 and granted Defendants’ two continuance requests over the Government’s
 19 objection. (Dkt. nos. 151, 243, 246, 247, 264.) The Court granted these continuances
 20 based on counsel for Defendants’ representation as to the case’s complexity, the need
 21 for them to process and review voluminous discovery and the need for Defendants to
 22 adequately prepare for trial. Prokop cannot seek delay of trial because of the need to

23
 24 ²⁴The Court also informed counsel of a note at the start of the day from another
 25 juror (Juror 6) who indicated that deliberations beyond that day would create a hardship
 26 for him. The Court informed counsel it would make inquiry with this juror at the end of the
 day. Again, there was no objection from counsel. No inquiry was conducted as the jury
 reached a verdict that afternoon.

27 ²⁵To the extent Prokop’s argument is that he is entitled to a new trial because of
 28 pre-indictment delay, the Court agrees with the Government that Prokop has not
 demonstrated how he is prejudiced by the delay.

1 process discovery information in order to properly prepare for trial and then claimed that
2 he was prejudiced by the same delay. See *United States v. Lewis*, 980 F.2d 555, 562
3 (9th Cir. 1992) (“Where a defendant’s own actions contribute to the need for an ‘ends of
4 justice’ continuance under [the Speedy Trial Act] the defendant cannot complain that a
5 continuance violates his or her speedy trial rights.”), abrogated on other ground by
6 *Bloate v. United States*, 559 U.S. 196 (2010).

7 **4. Claim of Proffered of Proof Denied**

8 Prokop argues that he should be entitled to a new trial because the Court denied
9 his offer of proof as to what certain witnesses on his witness list would testify to if
10 permitted to testify. Prokop does not explain the basis for his request or why denial
11 should result in a new trial. Based on Prokop’s request to make an offer of proof at the
12 Government’s case, the Court understands Prokop to take the following position. The
13 Court had denied his motion to dismiss based on the alleged ambiguities in certain
14 provisions of IRC § 44. (Dkt. no. 357.) The Court found that the allegations of fraud in the
15 Indictment do not rest entirely on IRC § 44. (*Id.*) The Court further noted that whether
16 IRC § 44 was ambiguous as applied to a home-based business or modification to a
17 website appeared to have no connection to the Government’s ability to prove the
18 charges in the Indictment. (*Id.*) The Court also noted that Prokop may again seek
19 dismissal if the Government were to offer evidence at trial that implicates the allegedly
20 ambiguous provisions of IRC § 44. (*Id.*) At the close of the Government’s case, Prokop
21 requested to make an offer of proof of evidence he would offer to support the argument
22 he made in his motion to dismiss as to the ambiguity in the tax law at the time of the
23 charged conduct. The Court found that such an offer of proof was unnecessary because
24 the case as presented did not implicate the allegedly ambiguous provisions of IRC § 44.
25 Prokop has not persuaded to the Court to reconsider its decision. Nor has he
26 demonstrated that the Court’s decision to deny his request to make an offer of proof
27 compels a new trial.

28 ///

1 **VIII. CONCLUSION**

2 The Court notes that the parties made numerous arguments and cited to evidence
3 and cases not discussed above. The Court has reviewed these arguments and cases,
4 evaluate the evidence and determines that they do not warrant discussion as they do not
5 affect the outcome of the issues raised in Defendants' motions.

6 It is ordered that Defendants' motions to join (dkt. nos. 465, 468, 469, 471) are
7 granted.

8 It is further ordered that the following motions are denied: (1) Coolidge's Motion
9 for New Trial (dkt. no. 464); (2) Rodrigues' Motion for New Trial (dkt. no. 466); (3)
10 Rodrigues' Motion for Acquittal (dkt. no. 470); and Prokop's Motion for Judgment of
11 Acquittal and/or New Trial (dkt. no. 467).

12 DATED THIS 28th day of January 2015.



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14 MIRANDA M. DU
15 UNITED STATES DISTRICT JUDGE
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